86-41

Supreme Court, U.S.
FILED
JUL 14 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1985

WILLIAM G. LaCHANCE, WILLIAM F. ZIMMERLI,
Petitioners,

-VS-

UNITED STATES OF AMERICA,
Respondent

Petition for a Writ of Certiorari to the
United States Court of Appeals for the
Second Circuit

IRA B. GRUDBERG, ESQ.
Jacobs, Grudberg, Belt & Dow, P.C.
350 Orange Street
New Haven, Connecticut 06503
(203) 772-3100
Counsel of Record for Petitioner Zimmerli

NINA J. GINSBERG, ESQ.
Zwerling, Mark, Ginsberg and Lieberman, P.C.
1001 Duke Street
Alexander, Virginia 22314
(703) 549-4333
Counsel of Record for Petitioner LaChance

ALICE S. MISKIMIN, ESQ.
Jacobs, Grudberg, Belt & Dow, P.C.
350 Orange Street
New Haven, Connecticut 06503
Of Counsel

63 pp

QUESTIONS PRESENTED

1. Whether the lower court erred in denying petitioners a hearing on their grand jury discrimination claims made pursuant to the sixth amendment and the Jury Selection Act of 1968, despite their prima facie statistical showing.

2. Whether the conflict among the lower federal courts as to appropriate statistical analysis of fair cross-section claims should be resolved.

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

Plaintiff:

United States of America

Defendants:

William. G. LaChance, William F. Zimmerli, John Schlagenhauf, and Thomas Ciggalione

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW.....1.

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS.....ii.

TABLE OF AUTHORITIES.....v.

OPINIONS BELOW.....2

JURISDICTION.....2

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED.....3

STATEMENT OF THE CASE.....6

REASONS FOR GRANTING THE WRIT.....17

I. The Second Circuit's Denial of a Hearing On Petitioner's Challenge To Grand Jury Selection Procedures Flies In The Face Of Constitutional Precedent And The Jury Selection And Service Act, And Conflicts With Decisions Among The Circuits.....17

A. The Second Circuit Misapplied Controlling Constitutional And Statutory Requirements.....20

B. The Second Circuit's Decision Misused Its Own Precedents And Conflicts With Other Circuits' Grand Jury Case Law.....38

II. The Lower Federal Courts Need Guidance As To The Appropriate Statistical Showing For A Prima Facie Case Under Duren v. Missouri.....46

CONCLUSION.....50

APPENDIX

TABLE OF AUTHORITIES

CASES Page

Abduc v. Lane, 468 F. Supp. 33 (D. Tenn.), aff'd, 588 F.2d 1173 (6th Cir. 1978).....42

Alexander v. Louisiana, 405 U.S. 625 (1972).....17,19,46

Alson v. Lopes, 621 F. Supp. 992 (D. Conn. 1985).....15

Alston v. Manson, Nos. 942, 943, slip op. at 3559 (2d Cir. May 23, 1986), aff'g Alston v. Lopes 621 F. Supp. 992 (D. Conn. 1985).....16,19, 44-46, 49

Anderson v. Casscles, 531 F.2d 682 (2d Cir. 1976.....50n.

Arnold v. North Carolina, 376 U.S. 773 (1964).....18n.

Boykins v. Massio, 715 F.2d 995 (5th Cir. 1983), cert. denied, 104 S. Ct. 1918 (1984).....49n.

Bush v. Kentucky, 107 U.S. 110 (1883).....18n.

Carter v. Texas, 177 U.S. 442 (1907).....18n.

Cassell v. Texas, 339 U.S. 282 (1950).....18n.

Castenada v. Partida, 430 U.S. 842 (1977).....passim

Duren v. Missouri, 439 U.S. 357 (1979).....passim

Eubanks v. Louisiana, 356 U.S. 584 (1958).....18n.

Hill v. Texas, 316 U.S. 400 (1942).....18n.

Hillery v. Pulley, 563 F. Supp. 1228 (E.D. Cal.), aff'd, 733 F.2d 644 (9th Cir. 1984), aff'd sub nom. Vasquez v. Hillery, 106 S.Ct. 617 (1986).....22,49n.

Machetti v. Linahan, 679 F.2d 236 (11th Cir. 1982), cert. denied, 459 U.S. 1127 (1982).....42,50n.

Moultrie v. Martin, 690 F.2d 1078 (4th Cir. 1982).....41,42,49n.

Pierre v. Louisiana, 306 U.S. 354 (1939).....18n.

Reece v. Georgia, 350 U.S.
85 (1955).....18n.

Rogers v. Alabama, 192 U.S.
226 (1904).....18n.

Rose v. Mitchell, 443 U.S.
545 (1979).....21,23n.,
33n.

Smith v. Texas, 311 U.S.
128 (1940).....18n.

Strauder v. West Virginia,
100 U.S. 303 (1879).....21

Swain v. Alabama, 380
U.S. 202 (1965).....20

Taylor v. Louisiana, 419
U.S. 522 (1975).....29,30,32

United States v. Bearden,
659 F.2d 590 (5th Cir. 1981),
cert. denied, 456 U.S. 936
(1982).....35,42

United States v. Clifford,
640 F.2d 150 (8th Cir. 1981).....41,50n.

United States v. Donahue,
574 F. Supp. 1269
(D. Md. 1983).....43

United States v. Hafen, 726 F.2d 21 (1st Cir 1984).....42,50n.

United States v. Jenkins, 496 F.2d 57 (1974), cert. denied, 420 U.S. 925 (1975).....10,13,15, 24,38,39, 44-45,49

United States v. LaChance, 788 F.2d. 856 (2d.Cir. 1986).....passim

United States v. Miller, 771 F.2d 1219 (9th Cir. 1985).....31

United States v. Newman, 549 F.2d 240 (2d Cir. 1977).....40,49

United States v. Perez-Hernandez, 672 F.2d 1380 (11th Cir. 1982).....43

United States v. Test, 550 F.2d 557 (10th Cir. 1976).....42,47

Vasquez v. Hillery,--U.S.--,108 S. Ct. 617 (1986).....21,24,33n.

Villafane v. Manson, 504 F. Supp. 78 (D. Conn. 1980), aff'd, 639 F.2d 770 (2d Cir. 1980).....37,43,44-46 49n.

Page

STATUTES AND RULES

United States Constitution, amend. VI.....3,13,29,46, 50

Jury Selection and Service Act of 1968, 28 U.S.C. §1861 et seq.....3,8,13,27, 47

Rule 11(a)(2), Federal Rules of Criminal Procedure.....11

LEGISLATIVE HISTORY

H. R. Rep. No. 1076, 90th Cong. 2d Sess. 5, reprinted in U.S. CODE CONG. & AD. NEWS 1792 (1968).....33

S. Rep. No. 891, 90th Conn. 1st Sess. 10, reprinted in U.S. CODE CONG. & AD. NEWS 1794 (1968).....36

OTHER AUTHORITIES

Finkelstein, The Application of

Statistical Decision Theory to the Jury Discrimination Cases, 80 Harv. L. Rev. 338 (1966).....23n.,38

Kairys, Jury Representativeness: A Mandate for Multiple Source Lists, 65 Cal. L. Rev. 776 (1977).....23n.

Sperlich & Jaspovice, Statistical Decision Theory and the Selection of Grand Jurors, Testing for Discrimination in a Single Panel, 2 Hastings Const. L.Q 75 (1975).....23n.

Sperlich & Jaspovice, Methods for the Analyses of Jury Selection: Testing for Discrimination on a Series of Panels, 6 Hastings Const. L.Q. 787 (1979).....23n.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

WILLIAM G. LACHANCE, WILLIAM F. ZIMMERLI,

Petitioners,

-VS-

UNITED STATES OF AMERICA,

Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

The petitioners William G. LaChance and William F. Zimmerli respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceedings on April 14, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 788 F.2d 856, and is reprinted in the Appendix hereto at pp. A3 ff.

The pretrial rulings of United States District Court for the District of Connecticut (Daly, C.J.) of May 2, 1984 and July 10, 1984, unreported, are reprinted in the Appendix hereto, pp. A63, A66.

JURISDICTION

The opinion of the United States Court of Appeals for the Second Circuit was handed down on April 14, 1986. A Motion for Extension of Time for Filing Petition for Rehearing until May 5, 1986 was granted. Defendants' Petition for Rehearing filed May 1, 1986 was denied on May 15, 1986, Appendix, A1, and this petition for certiorari is filed

within 60 days of the date of that ruling. Jurisdiction of this Court to review the judgment of the Second Circuit is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

28 U.S.C. §1867:

> (a) In criminal cases, before the voir dire examination begins, or

within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, the defendant may move to dismiss the indictment or stay the proceedings against him on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.

. . .

(d) Upon motion filed under subsection (a), (b), or (c) of this section containing a sworn statement of facts which, if true, would constitute substantial failure to comply with the provisions of this title, the moving party shall be entitled to present in support of such motion the testimony of the jury commission or clerk, if available, any relevant records and papers not public or otherwise available used by the jury commissioner or clerk, and any other relevant evidence. If the court determines that there has been a substantial failure to comply with the provisions of this title in selecting the grand jury, the court shall stay the proceedings pending the selection of a grand jury in conformity with this title or dismiss the indictment, whichever is

appropriate. If the court determines that there has been a substantial failure to comply with the provisions of this title in selecting the petit jury, the court shall stay the proceedings pending the selection of a petit jury in conformity with this title [28 USCS §1867].

(e) The procedures prescribed by this section shall be the exclusive means by which a person accused of a Federal crime, the Attorney General of the United States or a party in a civil case may challenge any jury on the ground that such jury was not selected in conformity with the provisions of this title. Nothing in this section shall preclude any person or the United States from pursuing any other remedy, civil or criminal, which may be available for the vindication or enforcement of any law prohibiting discrimination on account of race, color, religion, sex, national origin or economic status in the selection of persons for service on grand or petit juries.

. . .

STATEMENT OF THE CASE

In September, 1983, petitioners William LaChance, William Zimmerli, and four others were indicted in the District of Connecticut by a federal grand jury sitting at Bridgeport, on various marijuana smuggling charges arising out of a Coast Guard seizure earlier that month.

On March 6, 1984, thirty-six defendants including petitioners were indicted on superseding charges in a 29-count indictment covering a seven year period by the same federal grand jury. Defendant Zimmerli entered a plea of not guilty to all charges, and was later convicted of most of the counts after a full trial.

On November 10, 1983 Mr. LaChance, joined by the other defendants, filed a Motion for

Disclosure of Grand Jury Selection Documents. Based upon an order of Chief Judge T. F. Gilroy Daly, defendants and their expert Dr. John Lamberth reviewed the jury questionnaires of the then-current Bridgeport District grand jurors.

These petitioners and other defendants filed, or joined in, a Verified Motion to Dismiss Indictment and Stay Proceedings on Grounds of Substantial Failure to Comply with Law in the Selection of Grand and Petit Jurors on February 2, 1984. Appendix, at pp. A68 ff. The motion was supported by an affidavit by Dr. John Lamberth of Temple University. Appendix, at pp. A80 ff. Defendants alleged substantial and statistically significant underrepresentation of blacks and women on the 1977 and 1981 master (source list) and qualified wheels of the

Bridgeport Vicinage of the District of Connecticut in violation of the fifth and sixth amendments of the United States Constitution. Defendants also claimed violation of the "fair cross section" requirement of the Jury Selection and Service Act of 1968, 28 U.S.C. §1861 et seq. (the "Act") and of the Local Plan of Implementation.

Defendants' motion and Dr. Lamberth's affidavit applied standard deviation analysis as the means of showing statistically significant underrepresentation of blacks and women. A comparative disparity analysis was also offered, as well as probability calculations for the likelihood of the results' randomness.

Defendants had reviewed the jury records both before and after filing the Motion to

Dismiss, and appeared on May 2, 1984 with their expert for the hearing on the Motion. In addition, defendants had subpoenaed Kevin F. Rowe, Chief Deputy Clerk, Christine W. Cody, Deputy Clerk, and Richard Masotta, programmer, Yale Computer Center. For the hearing Mr. Rowe and Ms. Cody were directed to bring all documents pertaining to jury selection maintained by the Office of the Clerk of the Court. Mr. Masotta was instructed to bring copies of the 1981 Master Wheel computer programs utilized in selection of juries for the U.S. District Court, Bridgeport Division, and jury documents, tapes or requests sent by the Office of the Clerk or any township supplying juror selection data. Defendants sought to produce additional statistical and other evidence to

prove the degree and cause of the claimed substantial disparity in the selection system. Defendants also sought to prove that violations of the Jury Act and Local Plan had affected the random nature of the selection process.

At the May 2 hearing, the court ruled for the first time that defendants' papers addressed to the jury selection process had made an insufficient showing, and refused to allow any testimony or proffers of evidence as to the statistical basis of their claims. In a written Order entered July 10, 1984, the court ruled that, applying the statistical (absolute number) analysis used by the Second Circuit in United States v. Jenkins, 496 F.2d 57 (1974) cert. denied, 420 U.S. 925 (1975), the defendants had failed to make an adequate

showing on their claims of discrimination in the overall selection of grand and petit jurors.

On September 17, 1974, defendant LaChance entered conditional pleas of guilty under F.R. Crim. P. 11(a)(2), reserving his right to appeal the pretrial denial of the grand jury motion. On November 8, 1984, LaChance was sentenced to ten years' incarceration. On November 15, 1984, LaChance timely filed his Notice of Appeal.

The trial ran from September 19 through October 15, 1984. On that date, the jury returned guilty verdicts as to Zimmerli on all counts except an obstruction of justice charge. His motions for a judgment of acquittal and for a new trial were denied on November 19. On November 30, the district

court entered orders of forfeiture, sentenced Zimmerli to an effective sentence of 18 years, without parole, and imposed fines on various counts which totalled (after later reduction) $410,000.

On December 6, 1984, Zimmerli filed timely notice of appeal to the Second Circuit. On April 14, 1986, the court of appeals issued its decision affirming the district court, holding, as to these defendants, that: 1) petitioners had failed to make a showing sufficient to entitle them to a hearing on their motion challenging grand jury selection procedure; and 2) items taken during search of the Zimmerlis' home were legally seized and admissible.

A large portion of the Second Circuit's lengthy opinion is addressed to the issue of

the trial court's denial, without an evidentiary hearing, of petitioners' pretrial motion to dismiss the indictment based on violations of the fair cross section requirement of the sixth amendment and of the Jury Selection and Service Act of 1968, and on violations of the Act affecting the random nature and objectivity of the grand jury selection process. The court of appeals discussed at length, but did not decide, whether the cross-section challenge based on substantial minority underrepresentation should be determined by applying the "absolute number" analysis employed in United States v. Jenkins, supra, 496 F.2d at 66, as urged by the government and followed by Judge Daly, or by adopting the statistical approach used in Castenada v. Partida, 430

U.S. 482, 496-97 (1977), the standard deviation analysis employed by defendants' expert. 788 F. 2d 856, 865-69.

Because the statistical presentation in defendants' moving papers and Dr. Lamberth's affidavit combined data from the 1977 and 1981 Bridgeport District grand jury venires and qualified wheels, the court of appeals held that, on the statistics presented, it was impossible to determine the degree of under-representation on the 1981 venire and qualified wheel from which the indicting grand jury was drawn. It held further that defendants could challenge only improprieties affecting the particular grand jury which indicted them. The Court held that even if the defendants' statements of fact regarding the 1977 and 1981 combined

data were true, since those facts would not demonstrably consitutute a "substantial" failure to comply with the Act's fair cross-section requirement with respect to the 1981 venire and qualified wheel alone, the district court properly denied the motion without an evidentiary hearing.

Interestingly, meanwhile, on November 9, 1985, Judge Daly went totally the other way in a challenge to the jury selection in a Connecticut state court prosecution, purporting to distinguish his ruling in Zimmerli-LaChance, where he had relied on Jenkins to reject the application of statistical decision theory (SDT) to defendants sixth amendment claims. In Alston v. Lopes, 621 F. Supp 992 (D.Conn. 1985), he applied SDT to a claim of jury

discrimination, found a prima facie case of underrepresentation, and granted petitioners' writs of habeas corpus. On May 23, 1986, the Second Circuit affirmed, noting in dictum that "the absolute disparity approach in Jenkins may be outmoded and should be discarded." Alston v. Manson, Nos. 942, 943, slip. op. at 3568 (2d Cir., May 23, 1986). The Second Circuit's apparently conflicting opinion in United States v. LaChance had come down on April 14, 1986, only five weeks before its opinion in Alston.

On May 2, 1986 defendants petitioned the court of appeals for a rehearing of that portion of the court's decision which sustained the district court's denial of an evidentiary hearing and of the jury venire challenge. That petition for rehearing was denied on May 15, 1986.

REASONS FOR GRANTING THE WRIT

I. The Second Circuit's Denial of a Hearing On Petitioner's Challenge To Grand Jury Selection Procedures Flies In The Face Of Constitutional Precedent And The Jury Selection And Service Act, And Conflicts With Decisions Among the Circuits.

In affirming denial of petitioners' Verified Motion to Dismiss the Indictment, without the hearing provided under the Jury Selection and Service Act of 1968, 28 U.S.C. §1867(d), the Second Circuit not only violated the Act, but also denied petitioners' constitutional right to be indicted only by a reasonably representative and impartial grand jury, selected by neutral procedures. Duren v. Missouri, 439 U.S. 357 (1979); Castenada v. Partida, 430 U.S. 482 (1977); Alexander v.

Louisiana, 405 U.S. 625,628 (1972).[1] After lengthy discussion of alternative statistical methods, the Court of Appeals simply refused to apply any statistical test to the data proffered by petitioners.[2] United States v.

---

1. Unconstitutionally discriminatory procedures in the grand jury context were found also in: Arnold v. North Carolina, 376 U.S. 773 (1964); Eubanks v. Louisiana, 356 U.S. 584 (1958); Reece v. Georgia, 350 U.S. 85 (1955); Cassell v. Texas, 339 U.S. 282 (1950); Hill v. Texas, 316 U.S. 400 (1942); Smith v. Texas, 311 U.S. 128 (1940); Pierre v. Louisiana, 306 U.S. 354 (1939); Rogers v. Alabama, 192 U.S. 226 (1904); Carter v. Texas, 177 U.S. 442 (1907); Bush v. Kentucky, 107 U.S. 110 (1883).

2. Petitioners alleged substantial underrepresentations of blacks and women in the venires and qualified wheels for grand juries in Bridgeport in 1977 and 1981, presenting analyses of the data base by three statistical measures: (1) comparative disparity; (2) standard deviation, and (3) probability of each occurrence by chance.

LaChance, supra, 788 F.2d at 868. Petitioners were thus arbitrarily denied a hearing on their claims of substantial minority underrepresentation on federal grand juries in the Bridgeport Division of the District of Connecticut.

In addition, the Second Circuit's opinion below conflicts with decisions of the Fourth, Fifth, Ninth, and Eleventh Circuits, and with its own later holding in Alston v. Manson, with respect to the applicable statistical test for the prima facie showing that entitles the movant to an evidentiary hearing in such challenges. This Court has "never announced mathematical standards for the demonstration of 'systematic' exclusion of [minorities] . . . " in jury cases. Alexander v. Louisiana, supra, 405 U.S.at

630. See also Swain v. Alabama, 380 U.S. 202 (1965). As a result, the lower federal courts have continued to use a variety of different tests for deciding whether a prima facie showing of disparity exists. Consequently, there has been increasing inconsistency and confusion among the Circuits.

Both justice to these petitioners and the need for uniformity in the lower courts require review of the Second Circuit's judgment.

A. The Court of Appeals Misapplied Controlling Constitutional And Statutory Requirements.

Since 1880, this Court has repeatedly rejected all arguments that a conviction may stand despite racial discrimination in the

selection of the grand jury, Strauder v. West Virginia, 100 U.S. 303,308 (1880), and has refused to apply a harmless error standard, even where the evidence against the petitioner was overwhelming and where the prior system of discrimination had later been corrected. Vasquez v. Hillery, 106 S. Ct. 617,622 (1986); Rose v. Mitchell, 443 U.S. 545 (1979).

> Even if a grand jury's determination of probable cause is confirmed in hindsight by a conviction on the indicted offense, that confirmation in no way suggests that the discrimination did not impermissibly infect the framing of the indictment and, consequently, the nature or very existence of the proceedings to come.

Vasquez v. Hillery, supra, 106 S.Ct. at 623.

As in the instant case, the pivotal issue

underlying the appeal in Vasquez was the petitioner's statistical showing, made to claim discriminatory underrepresentation in the grand jury selection process, there on equal protection grounds. Hillery v. Pulley, 563 F. Supp. 1228,1238-48 (E.D. Cal. 1983), aff'd, 733 F.2d 644 (9th Cir. 1984), aff'd sub nom. Vasquez v. Hillery, 106 S. Ct. 617 (1986). Following the guidelines for statistical standard deviation analysis set forth in footnote 17 of Castenada v. Partida, supra, 430 U.S. at 496-97, the district court in Vasquez used probability analysis to interpret petitioner's data as to the disparities between the expected and the actual percentages of blacks on panels of potential grand jurors based upon the county population, averaged over a period of

seven years.[3] 563 F.Supp. at 1244-45.

Unlike the instant case, however, the district court in Vasquez held an evidentiary hearing and permitted testimony of the petitioner's expert witness and others, to aid in interpreting the data presented in

---

3. Commentators have consistently called for the use of some such objective statistical test in analyzing discrimination claims, e.g. the probablity analysis endorsed in Castenada, supra, and Rose v. Mitchell, supra, 443 U.S. at 571-79. See Finkelstein, The Application of Statistical Decision Theory to the Jury Discrimination Cases, 80 Harv. L. Rev. 338 (1966); Sperlich & Jaspovice, Statistical Decision Theory and the Selection of Grand Jurors, Testing for Discrimination in a Single Panel, 2 Hastings Const. L.Q. 75 (1975); Kairys, Jury Representativeness: A Mandate for Multiple Source Lists, 65 Cal. L. Rev. 776 (1977); Sperlich and Japovice, Methods for the Analysis of Jury Selection: Testing for Discrimination on a Series of Panels, 6 Hastings Const. L.Q. 787 (1979).

petitioner's affidavit. Here, the statistics of underrepresentation stated for the defendants below in their expert's affidavit were summarily rejected by the district court, applying the "absolute numbers" analysis earlier used by the Second Circuit in United States v. Jenkins, 496 F.2d 57,65-66 (1974), cert. denied, 420 U.S. 925 (1975). On appeal, the Second Circuit proceeded to avoid review of whether to apply either the "absolute numbers" analysis of Jenkins, or the standard deviation analysis set forth in Castenada and reaffirmed in Vasquez. United States v. LaChance, 788 F. 2d 856,867 (2d Cir. 1986).

The court below held that "because LaChance has not stated facts as to the 1981 sources from which the grand jury which

indicted him was derived" (emphasis added), whether or not petitioners' statistical presentation "would satisfy the second prong of the Duren test" could not be determined, and a hearing was neither warranted nor necessary.

The court of appeals did correctly state the showing required for a prima facie case in a fair cross-section challenge under Duren v. Missouri and the Act.

> Before it can be determined under the absolute numbers analysis, the standard deviation analysis, or any other statistical analysis, whether the claimed underrepresentation is 'substantial' (28 U.S.C. §1867(d)), two percentages must be shown. First, the defendant 'must demonstrate the percentage of the community made up of the group alleged to be underrepresented,'. . . . Second, the defendant 'must show the percentage representation

> of the groups in question on jury venires." (citations omitted) (emphasis added).

788 F.2d at 867. Having found that petitioners had met the first Duren requirement, and had "adequately stated 'the percentage of the community made up of the group[s] alleged to be underrepresented' [blacks and women], Duren, 439 U.S. at 364", the court then in effect arbitrarily "moved the finish line". 788 F.2d at 868.

Without explanation, and directly contrary to this Court's rulings in Duren and Castenada, the Second Circuit changed the terms for the data necessary to meet the second test from plural ("jury venires") to singular--"the jury pool (venire, qualified wheel)"--and limited the

test to the specific grand jury which indicted the defendants. Id. Because petitioners' statistics in fact "combined jury selection data for the 1977 and 1981 venires and the 1977 and 1981 qualified wheels", the Second Circuit claimed itself unable to "determine the degree of underrepresentation on the 1981 venire and qualified wheel." The 1977 and 1981 data, "taken together", were thus deemed "meaningless", and held to have "failed to state facts, which, if true, would constitute a substantial failure to comply" with the Act's fair cross-section requirement and the sixth amendment. 788 F.2d at 869.

As a matter of law, petitioners were and are entitled to a hearing, having stated facts which meet the requirements of the Act and the constitutional standards set in

Duren. As the court of appeals observed, it is now well established that the Duren three-part test to establish a prima facie violation of the sixth amendment also applies in determining whether a motion to dismiss under Section 1867 of the Act states "facts which, if true, would constitute a substantial failure to comply" with the statute.

Under Duren, the petitioner must show:

> (1) That the group alleged to be excluded is a "distinctive" group in the community'
> (2) That the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and
> (3) That this underrepresentation is due to systematic exclusion of the group in the jury selection process. (emphasis added)

Duren, supra, 439 U.S. at 364. The Duren

majority clearly stated its intention to develop a consistent body of sixth amendment law, referring to the fair cross-section inquiry earlier discussed in Taylor v. Louisiana, 419 U.S. 522,526-31 (1975):

> [J]ury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably represententative thereof. (emphasis added).

Taylor, supra, 419 U.S. at 538.[4]

---

4. Taylor held that systematic exclusion of women during the jury-selection process resulted in jury pools not "reasonably representative" of the community, thereby denying the criminal defendant his right under the sixth and fourteenth amendments to a jury selected from a fair cross-section of the community. See Duren, supra, 439 U.S. at 359.

The Fourth and Ninth Circuits have each emphasized that this Court's use of the plural in setting up the Duren test reflected the correlative use of the plural in Taylor, emphatically holding that no violation of the fair cross-section requirement can be premised upon proof of underrepresentation in a single venire, wheel, or jury.5 Here, the Second Circuit's holding below--that such a narrow showing as to a single venire must be made--directly contradicts the standard set by this Court and followed by other federal courts. "While juries must be drawn from a source fairly representative of the community, the composition of each jury need

---

5. As Taylor stressed, "Defendants are not entitled to a jury of any particular composition." 419 U.S. at 538.

not mirror the community." (emphasis in original). United States v. Miller, 771 F.2d 1219,1228 (9th Cir. 1985); Moultrie v. Martin, 690 F.2d 1078,1081 (4th Cir. 1982) (isolation of statistics of the indicting grand jury rejected because of the mandate of Castenada that "underrepresentation must be proved . . . over a significant period of time").

In this case, petitioners' data on minority disparity covered a substantial, continuous series of venires and wheels beginning in 1977 through and including the group from the 1981 venire and wheel that indicted petitioners in 1983. Such statistics cannot be rejected as either "meaningless" or unintelligible as to the flawed selection processes which the

percentages reflect. Presented alone, as the Second Circuit demanded[6], the 1981 data would obviously fail to meet the prima facie test of substantial disparity over a significient time period required by Castenada, Duren, and Taylor.

It is the selection process, analyzed over a significant time period, and not the particular composition of the indicting grand jury, which is fundamental under Taylor, Duren, Castenada, and stressed in the legislative history of the Act itself.

> Procedural regularity is the measure of the validity of the

---

6. The court of appeals' explanation was that "combining the data prevents discovery of any absence of, or insubstantial nature of, any underrepresentation in the 1981 venire and qualified wheel." 788 F.2d at 869.

> selection system. It is an appropriate measure since the bill sets up a largely mechanical process in which the role of human discretion is minimized. The bill does not guarantee that each venire or each jury will mirror the structure of the community. It guarantees only that appropriate selection procedures have been used. Moreover, challenges will lie only for substantial failure to comply with the statutory provisions. There is room for a doctrine of harmless error. (emphasis added).7

H.R. Rep. No. 1076, 90th Cong. 2d Sess. 5, reprinted in 1968 U.S. CODE CONG. & AD. NEWS 1792,1805.

---

7. The provision for "harmless error" under the Act contrasts sharply with the rule reiterated in Vasquez, supra, 106 S.Ct. at 622 and n.4 and Rose v. Mitchell, 433 U.S. at 574, that grand jury discrimination requires reversal of the conviction in all cases.

Clearly, a "substantial" violation of the Act could not be derived from data concerning only a single grand jury venire and wheel. The opinion below places petitioners--and any others challenging a grand jury selection process--in an impossible "Catch-22" situation. If the preliminary statistical showing is based only on the present venire, it will be insufficient under Duren. If the analysis goes back substantially in time, the court tells us, "How do we know that there is any underrepresentation on this venire?--and we won't give you an evidentiary hearing so we can find out." That is hardly fair, and does not comply with the statutory or constitutional requirements as interpreted by this Court.

While it is, of course, clear that "under the Act, '[d]efendants. . . may challenge only improprieties affecting the particular grand jury which indicted them," United States v. Bearden, 659 F.2d 590,601 (5th Cir. 1981), cert. denied, 456 U.S. 936 (1982), defendants may not be limited to challenge of only the indicting grand jury, when in fact they must show that more than one grand jury is affected by significant "improprieties" in the selection process itself.8 Both committee reports on the Act

---

8. While the court of appeals quotes Bearden in support of its denial of a hearing, in Bearden, a nine day hearing was held, wherein voluminous exhibits, live testimony and oral argument were received concerning the jury clerk's selection procedures over a four year period beginning in 1976, using average percentages. 659 F.2d 601-03.

expressly state that no challenge will lie to a single grand jury:

> [I]f the procedures outlined in the bill are otherwise rigorously followed, it is no departure from the standards of the legislation that the qualified jury wheel, the venire or array, or the jury itself, may not reflect a community cross-section. The act . . . does not require that at any stage beyond the initial source list that the selection process shall produce groups that accurately mirror community make up. Thus, no challenge lies on that basis.

S.Rep. No. 891, 90th Cong. 1st Ses. 10,17, reprinted in U.S. CODE CONG. & ADMIN. NEWS 1794 (1968).

The Second Circuit's unreasonable and arbitrary finding of "overbreadth" in petitioners' statistics clearly cannot stand. Obviously, had petitioners' claim been made

on the 1981 figures alone, it would have been briskly rejected as "unsubstantial", lacking the necessary continuity "over a significant period of time," just as the court rejected "any relief" based solely on underrepresentation in the 1977 figures. 788 F.2d at 868. The fallacy in the court's reasoning is underscored in its discussion of various statistical analyses for proof of randomness, which cites the need for a sizeable sample for a valid result.

> One of the principal reasons for using a standard deviation analysis and hypothesis testing is that it is axiomatic in statistical analysis that the precision and dependablity of statistics is directly related to the size of the sample being evaluated. Moultrie v. Martin, 690 F.2d 1078,1083 (4th Cir.1982); see generally Castenada, 430 U.S. 482, 97 S. Ct. 1272, 51 L.Ed. 2d 498; Villafane v. Manson,

504 F. Supp. 78 (D.Conn. 1980); Finkelstein, The Application of Statistical Decision Theory to the Jury Discrimination Cases, 80 Harv. L. Rev. 338 (1966).

788 F.2d at 866.

B. The Second Circuit's Decision Misused Its Own Precedents And Conflicts With Other Circuits' Grand Jury Case Law.

Neither the district court's denial of petitioners' Motion without a hearing, based upon United States v. Jenkins, nor the Second Circuit's rejection of petitioners' "combined 1977 and 1981 statistics" as "meaningless" under "any . . . statistical analysis", can be reconciled with Jenkins itself. In Jenkins, the "absolute numbers" test was applied to translate percentages drawn from "questionnaires sent out to members of the New

Haven division jury pools from 1969 to 1973", a four year span which gave rise to a claim of "disparity of 2.15 percent" against the adult Negro population base of the New Haven Division.9 496 F.2d at 64-65. In its discussion of Jenkins here, 788 F.2d at 865-66, the Second Circuit omits mention of the use of "combined" figures in Jenkins underlying the derived "difference in absolute numbers" there used to test fairness in an "average" jury array.

---

9. Using its "absolute numbers" analysis, the Jenkins court found the disparity between the census figures and the voter registration figures for the community would add "to an average array of 50 to 60 veniremen only one (1) additional Negro", an "actual" difference not substantial enough to violate appellants' constitutional rights. 496 F.2d at 65.

409 F.2d at 65.

The slipperiness of statistical rationales in Second Circuit cases is illustrated as well in the court of appeals' misuse of United States v. Newman, 549 F.2d 240 (2d Cir. 1977) as precedent for rejecting "overbroad statistics" here. In Newman, a jury challenge case, the Second Circuit found that the lower court's "merger" of statistics regarding exclusions of jurors in two geographically distinct and separate areas, the New Haven and Hartford judicial divisions of the District of Connecticut, had

> greatly distorted and arbitrarily altered the statistics of the New Haven division, which are, as thus changed, made useless."

788 F.2d at 869, quoting 549 F.2d at 244.

Here, on the contrary, the successive statistics for 1977 and 1981 Bridgeport grand juries are not "made useless", "distorted" or "arbitrarily altered" by being combined, but rather are made more stable and reliable because, ceteris paribus,

> the precision and dependability of statistics are directly related to the size of the sample being evaluated.

Moultrie v. Martin, supra, 690 F.2d at 1083.

Furthermore, following the approved use in Castenada of grand jury records covering the ten year period from 1962 to 1972, 430 U.S. at 487, other federal courts have examined similarly broad data bases in testing for random selection from voter registration lists. See United States v. Clifford, 640 F.2d 150,154 (8th Cir. 1981) ("absolute

numbers" test, period from July 1977 through November, 1979); Moultrie, supra, 690 F.2d at 1079-81 (standard deviation test applied to grand jury statistics for seven year period, 1971 through 1977); Bearden, supra, 659 F.2d at 601 (ten grand juries during a two year period); United States v. Test, 550 F.2d 597,583 (10th Cir. 1976) ("composite samples" including various dates and divisions from 1972 through 1974); United States v. Hafen, 726 F.2nd 21,23 (1st Cir. 1984) (juror qualification questionnaires for the period 1978 to 1980); Machetti v. Linahan, 679 F.2d 236,241 (11th Cir. 1982) (significant disparity over a period of twenty months from February 1971 through September 1975); Abduc v. Lane, 468 F.Supp. 33,34 (D.Tenn.), aff'd, 588 F.2d 1178 (6th Cir. 1978) (prima facie

case based on eleven and a-half years' grand juries); United States v. Donahue, 574 F.Supp. 1269,1278 (D.Md. 1983) (eighty-four grand jury lists between March 1973 and September 1982); Villafane v. Manson, 504 F.Supp. 78,81-87 (D. Conn.), aff'd, 639, F.2d 770 (2d Cir. 1980) (statistical decision theory analysis of total figures for forty-one grand juries between 1963 and 1971).[10]

---

10. Some of the cases cited also involved equal protection challenges. The standard for proving a prima facie violation is virtually identical under both fair cross-section and equal protection analyses. United States v. Perez-Hernandez, 672 F.2nd 1380,1384 n.5 (11th Cir. 1982). Different evidence is, of course, required for rebuttal: discriminatory purpose is irrelevant to a fair cross-section claim, which focuses solely on the composition of the venire and/or the procedures of the Act. See Duren, supra, 439 U.S. at 367-68 and n.26.

Finally, in Alston v. Manson, Nos. 942,943, slip op. at 3567 (2d Cir., May 23, 1986), the Second Circuit acknowledged the obvious conflict between its approval of the use of statistical decision theory analysis in both Villafane v. Manson, and Alston, and the absolute disparity test set out in Jenkins, applied by the district court in the instant case. Distinguishing equal protection from fair cross-section claims in Alston, the court restated the Duren rule: "In an analysis pursuant to the sixth amendment, a disparity can constitute a per se violation of an accused's right to trial by jury". Id. Clearly, the statistics necessary for a prima facie case need establish nothing more than the violation itself. How the numbers may be assembled,

measured and translated remains extraordinarily vague.

The "modern statistical decision theory" (SDT) approved in Villafane and Alston for "analyzing whether minority underrepresentation in the jury array is substantial" was of course precisely the method used by petitioners' expert here to show significant underrepresentation of blacks and women in the Bridgeport division from 1977 through 1981. Under Jenkins, petitioners' showing was held not enough to make a prima facie case. Affirming STD's use in Alston five weeks later, the Second Circuit recognized the incongruous and inconsistent results of its "two constitutional analyses"--the "absolute disparity approach" of Jenkins, applied to petitioners' fair cross-section claim, and

the "modern statistical decision theory" applied in Villafane and Alston. The conflict is clear, as the court itself acknowledged: "constitutional transgression was more easily established in Alston pursuant to the equal protection clause, despite the added burden of proving intent," slip op. at 3567, than the sixth amendment claim in LaChance, where only a mere showing of disparity was required. This Court should now resolve the continuing confusion as to the proper prima facie test for statistical evidence on a fair cross-section claim.

II. The Lower Federal Courts Need Guidance As To The Appropriate Statistical Showing For A Prima Facie Case Under Duren.

In Alexander v. Louisiana, supra, this

Court observed that it "has never announced mathematical standards for the demonstration of 'systematic' exclusion of blacks but has, rather, emphasised that a factual inquiry is necessary in each case that takes into account all possible explanatory facts." 405 U.S. at 630. Likewise, Congress did not prescribe a uniform statistical method for measuring departures from an "ideal" rather than a "fair" cross-section of the community under the procedures of the Jury Selection Act. As the Tenth Circuit noted in United States v. Test, supra, 550 F.2d at 589,

> Congress could . . . have set objective figures measured in terms of percentages, or stated standard statistical deviations for determining when [such] departures were 'statistically significant' rather than merely legally 'substantial'. It did not choose

> to do so. Instead, Congress delegated this function to the courts to be performed on a case by case basis.

Id. The collective experience of the courts in performing this function, however, has become increasingly disparate and confused. Despite the guidance of footnote 17 of Castenada, objective probability analysis and statistical decision theory have not replaced the courts' "visceral reactions" to proferred numbers when determining whether juries have been selected at random from a fair cross-section of the community.

Because the statistical showing necessary to establish "substantial disparity"--the second element of a Duren prima facie case--has yet to be defined by this Court, the resulting case by case growth of

confusion can only increase. The conflicting tests for a prima facie case within the Second Circuit alone, as illustrated in Jenkins, Newman, Villafane, LaChance and Alston, are reflected broadly across the federal courts. For example, the Second, Fourth, Fifth and Ninth Circuits have now endorsed statistical probability analysis,[11] yet the First, Second, Eighth, and Eleventh Circuits still continue to employ an absolute

---

11. See Alston, supra, Nos. 942,943 slip op. at 3559 (2d Cir., May 23, 1986); Villafane v. Manson, 504 F. Supp. 78 (D. Conn.) aff'd, 639 F. 2d 770 (2d Cir. 1980); Moultrie v. Martin, supra, 690 F.2d 1078 (4th Cir. 1982); Boykins v. Massio, 715 F.2d 995 (5th Cir. 1983), cert. denied, 104 S.Ct. 1918 (1984); Hillery v. Pulley, 733 F.2d 644 (9th Cir. 1984).

disparity test for a prima facie case.[12] The variance and confusion apparent in the courts of appeals should not be permitted to continue, where so fundamental an issue of law and fact as the standard for a prima facie case of unconstitutional jury discrimination is at stake.

CONCLUSION

This Court must exercise its supervisory power when the lower courts in general, and the Second Circuit in particular, have demonstrably failed to enforce the sixth

---

12. See United States v. Hafen, 726 F. 2d 21 (1st Cir. 1984); Anderson v. Casscles, 531 F. 2d 682 (2d Cir. 1976); United States v. Clifford, 640 F.2d 150 (8th Cir. 1981); Machetti v. Linahan, 679 F.2d 236 (11th Cir. 1982).

amendment's requirements by clear and consistent standards. Petitioners' convictions must be reversed, and the case remanded for further proceedings. For the reasons stated, this Petition for Certiorari should be granted.

Respectfully submitted,

Ira B. Grudberg
Counsel of Record for
William Zimmerli

Nina Ginsberg
Counsel of Record for
William LaChance

Alice S. Miskimin
Of Counsel